LIQUIDATOR, PARAMOUNT LTD. v. COMPTROLLER-GENERAL OF INLAND REVENUE

[O.C.J. (Chang Min Tat J.) December 13, 1969]

[Kuala Lumpur — Originating Motion No. 22 of 1969]

Income Tax — Sale of land by company in voluntary liquidation — Whether company carrying on business of dealing in real property — Whether profits chargeable to tax — Income Tax Ordinance, 1947, s. 10(1)(a).

In this case the facts were that the company which had wide powers including powers to acquire and dispose of lands acquired a piece of land in 1962 for $450,000 with planning permission to build a ten-storey block of 80 flats, 10 four-storey shops and flats and 2 four-storey shops and flats. The company submitted plans for these buildings and obtained approval. It also received a tender for the construction at $1,470,000. It tried to obtain loans to finance the construction but after several failures, it decided to dispose of the property and wind-up the company. The property was 10 months later sold for some $549,000, which after allowing for certain deductions left the company with a net profit of $91,309. The company was assessed tax on this amount. On appeal to the Special Commissioners the assessment was confirmed. The appellant appealed by way of case stated to the High Court.

Held: on the evidence in this case the Special Commissioners were justified in coming to the conclusion that in selling the land the company was carrying on the business of dealing in real property and that the profits from the sale were chargeable to income tax.

Cases referred to:-

(1) *Cooksey & Bibbey* v. *Rednall* 30 T.C. 514, 519.

(2) *Sharpless* v. *Rees* 23 T.C. 361.

(3) *James Hobson & Sons Ltd.* v. *Newall* 37 T.C. 609.

(4) *Snell* v. *Rosser, Thomas & Co. Ltd.* [1968] 1 W.L.R. 295.

(5) *Imperial Tobacco Co. Ltd.* v. *Kelly* [1943] 2 All E.R. 119; 25 T.C. 292.

CASE STATED.

Kok Wee Kiat for the appellant.

Nik Saghir bin Mohamed Noor (Senior Federal Counsel) for the respondent.

Chang Min Tat J.: This is yet another appeal, by case stated, against the decision of the Special Commissioners that the net profits from the sale of land by the appellant firm, in voluntary liquidation, were chargeable to tax under section 10(1)(a) of the Income Tax Ordinance, 1947.

The facts as found by the Special Commissioners can, I believe, be summarised thus:

Paramount Ltd., a company formed with wide powers including powers to acquire and dispose of land, acquired the land in question in 1962 for $450,000 odd, with planning permission to build a one ten-storey block of 80 flats, ten four-storey shops and flats and two four-storey shops and flats. The company then submitted plans for these building and obtained approval. It also received a tender for the construction at $1,470,000. It tried to obtain loans from banks and finance companies to finance the construction. After several failures, the board resolved to dispose off the property and wind-up the company. The property was finally sold for some $549,000 which after allowing for certain deductions for expenses and gifts left the company with a net gain of $91,309.

It was contended on behalf of the appellant that the company did not carry on any business of dealing with land and that the land was sold for the purpose of winding-up and the sale was accordingly a realisation of capital and not a sale of stock in trade and the excess an accretion of capital.

On the other hand, the respondent disputed the contention that the land was sold with a view to wind up the company. Though he did not say it in so many words, the respondent obviously considered the whole process a sham. He thought the willingness of finance companies to provide the money for the construction was never and in the constitution of the company ought never to be a *sine qua non* for its development scheme. The authorised capital was $2,000,000 of which a mere quarter had been utilised for the purchase of the land. If a call for the balance had been made, there would clearly have been sufficient money to finance the construction. Alternatively, the company could have entered into phased development. In these circumstances, the respondent contended that in selling the land, the company was not realising capital but trading in land.

On this, the Special Commissioners found that:

"It would seem that the true reason why the company proceeded to sell the lands was not because it was unable to carry out the investment scheme but it was anxious to realise a big profit knowing that the value of the lands had increased. All the facts of this case and particularly the fact that the lands were sold only ten months after they were bought seem to indicate that the company after working out a scheme to use the lands for investment purposes and after some unsuccessful attempts to raise loans for the construction decided to obtain quick profits by trading in the lands at a price enhanced by the granting of planning permission, approval of building plans and the clearing of some squatters on site. These are the reasonable inferences which can be drawn from the facts of this case, and in the result we come to the conclusion that in selling the lands the company was carrying on the business of dealing in lands."

With respect, I entirely agree.

As Croom-Johnson J. said in *Cooksey & Bibbey* v. *Rednall*[1]:

"I have no doubt that if there was evidence here that at some time after the original purchase of a lot of this property these two gentlemen together had gone in for a system of land development with regard to that or part of it, it would have been open to the Commissioners to find that they had turned what had been an investment into the subject-matter of a trading in land.... Everything must depend on the exact circumstances."

There is, in this case, as found by the Special Commissioners and not challenged by the appellant, clear evidence of a system of land development. The land was clearly never bought as an investment. It was bought for development. Nevertheless, the appellant argued that the sale was not sale of stock-in-trade but realisation of capital. This the Special Commissioners had no difficulty in rejecting. On the authority of *Sharpless* v. *Rees*[2] and *James Hobson & Sons Ltd.* v. *Newall*,[3] they held that there was a trading in the property though it had been acquired for purposes other than trading.

It has not been shown to me that their reliance on these two cases was wrong. On the other hand, there is confirmation for their view in the case of *Snell* v. *Rosser, Thomas & Co. Ltd.*[4] which was not brought to their attention. In that case, a company whose main business was that of building contractors with powers however of acquiring and disposing of land purchased a house which involved purchasing also 5¾ acres of land. The house was converted and sold. Subsequently the adjoining land was sold. Between the purchase and the sale, nothing was done about the land. Ungoed-Thomas J. on appeal from the commissioners had this to say:

"Here, it has been suggested that this land, as contrasted with Lisvane House itself, must be treated as a separate entity, as subject to separate considerations and, indeed — and I hope I am not doing an injustice to the argument — as though it were acquired and dealt with altogether independently, having nothing to do with the stock-in-trade, which Lisvane House was. That is not the real situation. The real situation here is clearly, to my mind, that it was bought because, and only because, Lisvane House could not be bought without it. It was in that sense incidental to the purchase of Lisvane House. It was never used by the company at all, and was disposed of by the company at the first favourable opportunity. As I read it, therefore, it was simply something incidental to the stock-in-trade, which was disposed of at an early favourable opportunity without being used by the company at all. It was an asset of the company which was never treated as an investment by the company. It never became a fixed asset of the company. It seems to me in accordance with the principles in the cases from which I have quoted that it was part of the stock-in-trade of the company, and that on its sale the receipt should properly be treated as an income receipt of the company."

In my view, the case before me is a much stronger case. The land that was bought was stock-in-trade for the purposes for which it was intended. It was in the words of Lord Greene M.R. in *Imperial Tobacco Co. Ltd.* v. *Kelly*,[5] "an essential part of a contemplated commercial operation."

I therefore hold that on the evidence the Special Commissioners were entirely justified in coming to the conclusions that in selling the land Paramount Ltd. was carrying on the business of dealing in real property and the profits from the sale were chargeable to income tax under section 10(1)(a) of the Income Tax Ordinance 1947.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Mah & Kok.*

ELIATHAMBY v. SHEIKH MOHAMED BIN SAID

[O.C.J. (Sharma J.) March 15, 1970]

[Muar — Originating Summons No. 283 of 1968]

Land Laws — Charge — Notice for repayment not only of principal but also of interest — Charge executed not providing for payment of principal sum on demand — National Land Code, 1965, ss. 254 and 255 and Forms 16D and 16E — Notice under s. 255 in the Form 16E — Notice should have been given under s. 254 and in the Form 16D.

This was an application by the chargee for an order for sale of the land charged to him by the chargor as a security for the loan taken by him. The respondent raised a preliminary objection as to the validity of the notice given by the applicant under section 255 of the National Land Code.

Held: as the charge executed to the respondent was not a charge in which the principal sum secured was payable on demand and to which section 255 of the National Land Code applied, the only valid and effective notice which the applicant was entitled to give was the notice under section 254 of the National Land Code and as he had failed to do this the application must be dismissed.

[Editorial Note: See however *V.A.M. Hussain* v. *BP Malaysia Bhd.*, *ante*, p. 69, F.C.]

Cases referred to:-

(1) *Hardial Singh* v. *Harbans Singh* [1954] M.L.J. 134.

(2) *R. M.S.T. Somasundram Chetty* v. *Ng Sin Tan* (1923) 3 F.M.S.L.R. 205.

ORIGINATING SUMMONS.

Elyas Majeed for the applicant.

M. Thiruchelva Segaram for the respondent.

Sharma J.: This is an application by the chargee for an order for sale of the land charged to him by the chargor as a security for the loan taken by him. For the purposes of this judgment it is not necessary to go into the details of the transaction between the parties or to deal with facts disputed by them. The charge was executed on June 6, 1963 and registered on June 15, 1963. The charge provided for repayment, on a specified date, of the principal sum and for payment of interest every month on a date certain and in case of default in the payment of the instalments due on account of interest "the whole of the amount then owing under" the charge was to "become immediately due and payable." The chargor made default and on the 19th day of December, 1967, the solicitors for the chargee sent a notice to the chargor under section 255 of the National Land Code, 1965. The notice was in Form 16E of the First Schedule to the National Land Code. Form 16E is prescribed under section 255 and is confined to cases where the *principal sum* secured by the charge is *payable on demand*. The form itself bears the heading "Demand for Payment of a Principal Sum" and speaks of "the principal sum secured by the charge . . . payable on demand."

Section 255(1) of the National Land Code reads as follows: —

"Where the principal sum secured by any charge is payable by the chargor on demand, the chargee may make the demand by a notice in Form 16E, and in that event, if the sum in question is not paid to him within one month of the date on which the notice is served, may apply forthwith for an order for sale without being required to serve a notice in Form 16D under sub-section (1) of section 254."

The marginal note to section 255 suggests that the section deals with a special provision with respect to sums payable on demand. Section 254 of the National Land Code deals with "any charge" and the charge referred to in section 254 is unqualified as to its quality and provisions. Section 254 is a general provision whereas section 255 deals with a special provision for a special type of charge. The notice prescribed under section 254 is in Form 16D and the primary object of that notice is to give the chargor an opportunity to remedy the breach specified in the notice within one month of the service of that notice on him. It is only